STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 6860

Petitions of Vermont Electric Power Company, Inc. and Green Mountain Power Corporation for a Certificate of Public Good authorizing VELCO to construct the so-called Northwest Vermont Reliability Project, said project to include: (1) upgrades at 12 existing VELCO and GMP substations located in Charlotte, Essex, Hartford, New Haven, North Ferrisburg, Poultney, Shelburne, South Burlington, Vergennes, West Rutland, Williamstown, and Williston, Vermont; (2) the construction of a new 345 kV transmission line from West Rutland to New Haven; (3) the construction of a 115 kV transmission line to replace a 34.5 kV and 46 kV transmission line from New Haven to South Burlington; and (4) the reconductoring of a 115 kV transmission line from Williamstown, to Barre, Vermont

DEPARTMENT'S REPLY MEMORANDUM ON WHETHER TO REOPEN

The Department of Public Service ("DPS" or the "Department") files this memorandum with the Public Service Board ("PSB" or the "Board") in response to the motions and memoranda on reopening this proceeding filed on or about September 1, 2005 by the Conservation Law Foundation ("CLF"), the Town of New Haven ("New Haven"), the Vermont Business Roundtable (the "Roundtable") and the Vermont Electric Power Company, Inc. ("VELCO"). DPS will discuss each party's filing in turn.

A. Response to CLF

The Department's memorandum of September 1, 2005 addresses the issue of substantial change raised by CLF. DPS incorporates that filing by reference.

CLF's motion is governed by the scope of the Court's remand, which is that the Board must make a threshold determination on whether to reopen. DPS contends that CLF's motion does not demonstrate persuasively that the Board should reopen the proceeding.

CLF's memorandum in support of the motion repeatedly omits critical language from the substantial change test, which is whether a change has the potential for *significant* impact under one or more of the Section 248 criteria. In re Citizens Utilities Company, 179 P.U.R. 4th 16, 94-5

(Vt. 1997). CLF instead characterizes the test as "potential impact," leaving out the word "significant," even though the Vermont Supreme Court held this term to be essential to the validity of the test. In re Barlow, 160 Vt. 513, 522 (1993). For example, on page 2, CLF uses the words "potential to have an impact . . . ." Similarly, on page 3, CLF claims that the cost increase has the "potential for impact under the 248(b) criteria."

Under the "substantial change" test, it is not enough to show potential impact. CLF must show the potential for *significant* impact. CLF appears to rely on the "near doubling" of project cost to establish the significance of the impact under § 248(b)(2), but fails to address at all how the increase overcomes the Board's prior determinations that alternative resource configurations ("ARC") cannot meet the need in a timely manner. See, e.g., Order of 1/28/05 at 52-3, 57. If the ARCs cannot meet the need on time, then the potential impact of the estimated cost increase is unlikely to be significant under § 248(b)(2).

In this regard, Section 248(b)(2) is more than a cost comparison statute. It requires that the NRP and any alternatives actually meet the need. Specifically, § 248(b)(2) states that the Board must find that the NRP "is required to the *meet the need* for present and future demand for service *which could not otherwise be provided*" more cost-effectively by alternatives. (Emphasis supplied.) The need in this case is time-related, and if alternatives cannot meet the need in a timely manner, then that fact alone is sufficient to demonstrate compliance with § 248(b)(2). As the Board stated in the Hydro-Quebec contract approval decision, "the law requires that we determine whether those [alternative] measures could, if undertaken, avoid the need for the purchase by 'otherwise providing' the energy services that the purchase is designed to provide."

In re Application of Twenty-four Electric Utilities, Docket No. 5330, Order of Oct. 12, 1990 at 79, citing 30 V.S.A. § 248(b)(2).

CLF's concern about approving the project "at any cost" is well taken, but that concern is not enough to establish that the specific increase in estimated cost has the potential for significant impact under § 248(b)(2).

The concern also is substantially mitigated by the regional sharing of the project costs, which is relevant to whether the project has the potential for significant impact under §§ 248(a) (general good of the state) and 248(b)(4) (economic benefit to the state and its residents).[1]

Finally, CLF's memorandum does not address the question of whether reopening or not reopening best promotes the general good of the state. DPS believes that the potential for significant impact on the general good of the state would arise if the Board were to delay a project that will meet reliability standards which the Board already determined must be met now in order to pursue ARCs that it has determined cannot timely meet those standards.

B. Response to New Haven

Like CLF's motion, New Haven's motion is governed by the scope of the Court's remand, which is that the Board must make a threshold determination on whether to reopen. DPS contends that New Haven's motion does not demonstrate persuasively that the Board should reopen the proceeding. DPS will address the following points in New Haven's motion: VRCP 60(b)(3), Board Rule 2.204(G), the approved 345 kV line, burial of the 115 kV line at the Route 17

[1]In addition, the increase in estimated cost in this case appears driven by factors largely outside of VELCO's control, an assertion by VELCO on which DPS has requested that the Board direct VELCO to provide evidence.

crossing, the request for discovery, and the request for payment of intervenor costs based on In re Investigation into General Order 45 Notice of Vermont Yankee, Docket No. 6300, Order of 12/15/00.

VRCP 60(b)(3). In relevant part, the Board may relieve a party from a final judgment, order or proceeding based on "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party." VRCP 60(b)(3). A party seeking such relief must demonstrate fraud, misrepresentation, or misconduct "by clear and convincing evidence." Gavala v. Claassen, 2003 VT 16 ¶ 5, 175 Vt. 487 (2003). The purpose of the rule is to protect the fairness and integrity of the litigation process. Lonsdorf v. Seefeldt, 47 F.3d 893, 898 (7th Cir. 1995). While it is not necessary to show that the alleged misconduct would change the outcome of the case, the movant must show clearly and convincingly that the misconduct prevented it from fully and fairly presenting his or her case at trial. Anderson v. Cryovac, 862 F.2d 910, 923, 924 n.10 (1st Cir. 1988); Karak v. Bursaw Oil Corp.. 288 F.3d 15, 21 (1st Cir. 2002).

New Haven's motion and memorandum fail to show clearly and convincingly either that VELCO committed misconduct or that any alleged misconduct prevented New Haven from full and fairly presenting its case. Instead, New Haven reiterates arguments on the merits that it made previously.

Further, if the primary drivers of the increased cost estimates are factors beyond VELCO's control, then this fact would be relevant to whether to reopen based on alleged misconduct of VELCO. DPS has asked that the Board direct VELCO to provide evidence on this point.

Board Rule 2.204(G). New Haven cites to this rule as if either VELCO had asked to amend its evidence in support of the Northwest Reliability Project ("NRP") or the rule somehow creates an obligation on VELCO to amend. Neither circumstance is true. The rule is a procedural rule which applies to "proposed amendments" to filings. VELCO has not proposed to amend its filing.

345 kV Line. New Haven largely repeats arguments made prior to decision that relate to: (a) component-specific evidence under § 248 and (b) transmission-only alternatives to the NRP.

As to the issue of component-specific evidence, by order of May 28, 2004, the Board rejected as a matter of law New Haven's argument that such evidence is required. New Haven fails to show how the increased cost estimates would affect the reasoning of that order.

As to the issue of transmission-only alternatives to the NRP, New Haven largely focuses on issues that are unaffected by the new capital cost estimates, e.g., whether alternatives meet the reliability standards, consideration of possible future transmission plans, line losses, and environmental impacts. New Haven advances no reason why the increased cost estimates change these characteristics or impacts of the NRP or transmission-only alternatives. The increase in cost is unlikely to change the reliability performance of the NRP and its alternatives, their relationship to possible future upgrades, their relative line losses, or their environmental impacts.

One area that the increased cost estimates for the NRP might affect is the cost comparison among the transmission-only options. DPS has asked the Board to require VELCO to provide evidence on the current cost of transmission-only alternatives to the NRP that, like the project, meet the N-2 criterion at a 1,200 MW load level. If the increased cost estimates are driven by

market factors affecting transmission line construction, then it appears probable that the cost of all the transmission-only options has risen.

DPS notes that New Haven's cursory dismissal of the future expansion issue fails to account for the fact that a 345 kV line from New Haven to Williston is likely to be needed sooner than "twenty plus" years. Specifically, VELCO's advance planning has identified a possible need for such a line at a 1400 MW load level, and earlier if certain other upgrades are not completed. DPS-Cross-7, attaching Northwest Reliability Project 1250 to 1540 MW Study at 6. These other upgrades require the involvement of jurisdictions outside Vermont. Id. They may not materialize and, if they do not, the 345 kV line from New Haven to Williston would be needed at a lower load level. Id.

As found by the Board, the 1400 MW VELCO system load level is predicted to be reached in 2020. Order of 1/28/05 at 28. If a 115 instead of a 345 kV alternative from West Rutland to Williston goes into service in 2007, then the result could well be tearing down and rebuilding that line after 13 years or less, with consequent loss of millions of dollars in sunk costs.

Burial at the Route 17 Crossing. New Haven is correct that the Board considered the cost of undergrounding in deciding whether to require it. Order of 1/28/05 at 98-9. However, New Haven is unpersuasive when it suggests that the new cost estimates require the Board to reconsider its decision on line burial at the Route 17 crossing. New Haven ignores that, if the cost of raw materials, components, and labor has risen for transmission line projects, then they probably have risen for transmission line *burial* projects. Thus, there is a reasonable likelihood that the cost to construct a 115 kV underground line using a four-cable design would be significantly higher than

the approximately $2.2 million to $2.9 million per mile found by the Board. Id. at 98. Yet the aesthetic impacts of the Route 17 crossing against which those costs were balanced would be unchanged from those previously considered by the Board in rejecting burial at this location. The increased cost estimates, therefore, would tilt the balance further against undergrounding.

In the alternative, if the Board were to reopen aesthetic mitigation based on the increased cost estimates, the Board could not reasonably limit that reopening to burial of the Route 17 crossing. Instead, the Board would have to treat all costly aesthetic mitigation the same way. This would mean, for example, reopening the issue of relocating the New Haven substation, the estimated cost of which would be affected by the market factors asserted by VELCO and therefore likely has increased substantially from the $1.8 to 2.3 million found by the Board. Id. at 102.

Discovery. The Board should decline New Haven's request for a discovery order. Under the Board rules, discovery is intended to be self-executing. Board Rule 2.214(A), VRCP 26(a). If New Haven's complaint is that VELCO has not responded to its prior discovery issued July 21, 2005, then New Haven must engage in good-faith consultation with VELCO's counsel under VRCP 26(h) and, if such consultation fails, must file a motion to compel under VRCP 37 with an attached affidavit attesting to such consultation. VRCP 26(h), 37(a). It has not filed any such motion.

Separately, New Haven does not provide a compelling rationale for the Board to require formal discovery at this juncture. The decision before the Board is not on the merits of a case but rather on whether to reopen a case that has already been exhaustively litigated, with thousands of discovery requests and responses. Further, the short time frame required by the Court renders it highly difficult, if not impossible, to set a reasonable schedule for discovery. A discovery

schedule should be instituted only if the Board decides to reopen the proceeding.

Docket No. 6300. The Board should deny New Haven's request that it "adopt the solution" from Docket No. 6300's Order of December 15, 2000. In that case, the Board held that a settlement was "effectively an amendment" because "Petitioners no longer seek our approval of their original proposal, but rather request that we base our review upon a new proposal, as represented by the settlement," and required the petitioners to pay some intervenor costs for review of the amendment. In re Investigation into General Order 45 Notice of Vermont Yankee, Docket No. 6300, Order of 12/15/00 at 8.

These circumstances do not apply. VELCO does not ask for Board approval of the increased cost estimates or for a further review of the project based on the estimates. Moreover, VELCO's July 8, 2005 filing is a notice to the Board that the estimated cost of an already-approved project has increased. The Board should encourage VELCO and other utilities to come forward with such information and not "reward" them for doing so by requiring them to pay another party's costs.

Alternatively, if the factors driving the increased cost estimate are beyond VELCO's control, this fact should be considered in deciding whether justice requires granting New Haven's request.

C. Response to the Roundtable

The Roundtable appears to oppose reopening the project, for reasons similar to those advanced by the Department. DPS appreciates the Roundtable's comments.

D. Response to VELCO

VELCO opposes reopening the project, as does DPS. DPS agrees with much of VELCO's filing, but also will address the following points of concern: VELCO's position that the Board cannot reopen unless a motion under VRCP 60(b) is filed, errors in VELCO's assertions concerning the "controlling legal standard and case law," and VELCO's arguments relative to holding an evidentiary and the scope of any such hearing.

Necessity for a Motion. The Board has already stated a desire to consider reopening the proceeding in its memorandum of July 11, 2005. VELCO cites no authority for its implicit proposition that the Board cannot consider *sua sponte* whether to reopen its own order, especially where as here a utility has submitted information to the Board showing that the estimated cost of a major project has increased dramatically. 30 V.S.A. § 2(c) contradicts VELCO's argument, stating that "[t]he public service board, with respect to any matter within its jurisdiction, may issue orders on its own motion and may initiate rulemaking proceedings."

VELCO's contention also does not account for the Court's remand order, which now requires the Board to consider whether to reopen this proceeding.

Legal Standard. VELCO's assertion of the "controlling legal standard and case law" is correct in part and erroneous in part. VELCO is correct that, under VRCP 60(b)(2), the Board has applied a standard that the newly discovered evidence must be "of such a material and controlling nature as will probably change the outcome." In re Petition of Ryegate Wood Energy Co., Docket No. 5217, Order of 11/30/90 at 5, quoting Moore's Federal Practice § 60.23[4] (2d ed. 1990). As DPS stated in its memorandum of September 1, 2005, this standard is supported by federal case

law under FRCP 60(b)(2). See, e.g., U.S. v. Int'l Brotherhood of Teamsters, 247 F.3d 370, 392 (2d Cir. 2001); Hoult v. Hoult, 57 F.3d 1, 6 (1995), cert. den. 527 U.S. 1022 (1999).

VELCO also is correct that the case of Bonfanti v. Ayers, 134 Vt. 421 (1976), supports the standard applied by the Board in Ryegate, since it states that it must appear that the newly discovered "evidence is such as will probably change the result if a new trial is granted . . . ." Id. at 423.

VELCO is not correct, however, as to other Vermont cases it cites in support of this standard. For example, Darken v. Mooney, 144 Vt. 561 (1984), which applies VRCP 60(b)(2), does not address or discuss the standard quoted by VELCO from the Board's Ryegate decision. Id. at 566. Okemo Mountain, Inc. v. Okemo Trailside Condominiums, Inc., 139 Vt. 433 (1981), also does not address or discuss that quoted standard, and is a case under VRCP 60(b)(1) (mistake or inadvertance), not VRCP 60(b)(2) (newly discovered evidence). Id. at 436. State Highway Board v. Jamac, 131 Vt. 510 (1973) similarly does not address or discuss that standard, and is a case under VRCP 59. Id. at 515-16.[2]

More importantly, VELCO cites no case law demonstrating that the "material and controlling" standard extends beyond VRCP 60(b)(2) (newly discovered evidence) to the other grounds for reopening under VRCP 60(b)(1) and (3)-(6), even though its memorandum appears to imply that such is the case.

Evidentiary Hearing. DPS disagrees with VELCO's opposition to an evidentiary hearing.

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[2]While VELCO is correct that the Board in the Ryegate case cited these cases in support of the standard it used, that prior citation does not change what the cases actually say.

VELCO's filings on reopening the case repeatedly make relevant factual assertions. The Department's filing of September 1, 2005 details the many factual assertions made by VELCO in its prior pleadings on reopening, including the consequences of reopening to the project and to Vermont. VELCO continues to make many of these assertions in its own memorandum of September 1, 2005, including great detail on its mobilization to build the project (page 5) and the issue of competition with other transmission projects (page 6). The Board should consider all these facts, but it cannot do so without an evidentiary hearing.

Limit on Evidentiary Hearing. DPS is concerned with VELCO's alternative request to limit any hearing to evidence related to whether the new cost estimates would change the outcome under § 248(b)(2) (need) and 4 (economic benefit). While DPS believes that, given the scope of the remand and its short time-frame, reasonable limits must be placed on the scope of any such hearing, DPS would oppose a limit that excludes consideration of any of the items listed in Section E of the Department's memorandum of September 1, 2005.

To be clear, DPS believes that all of these items are within the limit proposed by VELCO. However, and in the alternative, DPS contends that each of them is relevant to whether the project and the reopening of this proceeding promote the general good of the state, and the Board should direct VELCO to provide evidence on them at an evidentiary hearing. For example, it is critical for the Board to have information on the consequences and costs of reopening the proceeding, including potential reliability implications, impact on mobilization to construct the project, and potential for cost escalation during the reopened proceeding.

VELCO previously supported consideration of the general good of the state in deciding

whether to reopen, stating on page four of its July 14, 2005 comments on the issue that the general good of the state is relevant to "[a]ny reconsideration of the Board's Order in this proceeding."[3]

E. Conclusion

The Board is at an important fork in the road with respect to the NRP and maintaining reliable electric service in Vermont. It can go down the path of reopening the project or it can continue with project implementation. The Board should make its decision with careful consideration of whether reopening or not reopening best promotes the general good of the state.

As discussed in the Department's memorandum of September 1, 2005, DPS believes that the Board should clearly establish that, in a given case, a significant increase in estimated cost can be grounds to reopen a § 248 proceeding and that, in the future, the Board will make decisions on this issue on a case-by-case basis, using the "substantial change" test.

Looking at the facts and circumstances of this case, based on what it knows today, DPS does not support reopening the proceeding for the reasons stated in the Department's September 1 memorandum. The Department believes that the consequences of reopening this docket appear significantly detrimental to the general good of the state, including risking the provision of reliable electric service to Vermonters.

Finally, DPS asks that the Board convene an evidentiary hearing and direct VELCO to

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[3]In arguing for the proposed limit on the evidentiary hearing, VELCO incorrectly asserts that the Department's prior pleadings on the issue of reopening state that "the relevant scope of evidence" should be limited to whether the project continues to meet § 248(b)(2) and (4). DPS has made no such statement. In response to an e-mail (Attachment A), VELCO counsel states that VELCO meant to refer to the Board's July 11, 2005 memorandum. Yet that memorandum merely identifies that the increased cost estimates are relevant to § 248(b)(2) and (4), and does not rule that the estimates are relevant *only* to those criteria.

provide evidence as requested in Section E of the Department's September 1 memorandum.

Dated at Montpelier, Vermont this 6th day of September, 2005.

VERMONT DEPARTMENT OF PUBLIC SERVICE

By:_____
Aaron Adler, Special Counsel

cc: Attached Service List